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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 422

CLINTON P. ANDERSON, Secretary of Agriculture, United States Department of Agriculture,

Respondent,

—against—

MARIO MERCADO E HIJOS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the United States:

Mario Mercado E Hijos, a Puerto Rican partnership, defendant in the above-entitled action, prays the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit to review a judgment and decision of that Court entered on August 25, 1947, which reversed a judgment (R. 143-4) of the United States District Court for Puerto Rico and remanded the case to the District Court for further proceedings in accordance with the opinion of the Circuit Court.

Basis of This Court's Jurisdiction

The jurisdiction of this Court is invoked pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347(a). The Circuit Court has stayed the issuance of the mandate pending further order of the Court upon condition that the within petition be filed with this Court on or before November 1, 1947 (R. 169).

Statement of Matter Involved

The action was instituted on December 20, 1944, by the then Price Administrator, under Section 205(e) of the Emergency Price Control Act of 1924 (50 U. S. C. App. §925(e)). On March 3, 1944, the defendant, a local sugar "central" in Puerto Rico, entered into a contract with Destileria Serralles, Inc. under which defendant undertook to sell and deliver 1,250,000 gallons of cane blackstrap molasses at a price of 17¢ per gallon (Pltf. Ex. A, R. 103, 13). On May 9, 1944, by Amendment 32 to the existing Revised Maximum Price Regulation 183, a specific price ceiling of 13.6¢ per gallon became effective (9 F. R. 4820). Below, the Price Administrator contended that no "delivery" occurred within the meaning of the Amendment until after May 9, 1944, when the 13.6¢ price ceiling was applicable, and on the basis of claimed simple damages of $42,500 asked judgment for statutory (treble) damages of $127,500 (R. 2-3). The District Court held that 887,985 gallons were delivered prior to May 9, 1944, the effective date of the 13.6¢ ceiling, but sustained a violation of Amendment 32 in respect to the remaining 362,055 gallons delivered between May 9 and June 24, 1944, awarded simple damages of $12,309.86 with respect to such gallonage, and, acting within its discretion, refused to treble the damages (R. 134-44).

Amendment 32 was limited to molasses "delivered at the mill". The molasses when produced was deposited by the seller, not in the seller's mill tank at Guayanilla, but at a tank owned by the seller some two miles distant at Penoncillo on the seacoast (R. 12-13). On production, title to the molasses immediately vested in the buyer; as and when the molasses was deposited in the Penoncillo tank, the buyer made payment; and the buyer thereupon insured the molasses at its own risk (R. 12-13; Pltf. Ex. A, R. 103).

The Circuit Court of Appeals reversed and remanded the case. It held that the defendant did not make "delivery" of the molasses until the purchaser actually removed the molasses from the Penoncillo tank, and, since such removal did not occur until after August 2, 1944, the effective date of still another Amendment to Revised Maximum Price Regulation No. 183 (9 F. R. 9248), such Amendment applied (R. 162-5).* The Court remanded the case for the entry of a judgment of $42,500 simple damages on account of the resulting overcharge, and also directed the District Court to reconsider the question of multiple damages, and, if necessary, to take further evidence in this connection (R. 166-9).

The Facts

1. In February 1944, when the contract of March 3, 1944, was in process of negotiation, General Maximum Price Regulation alone was in effect. It specified that the maximum price for any commodity should be "the highest price charged by the seller * * * to a purchaser of the same class" during a specified period which, for Puerto Rico, was April 10 to May 10, 1942, inclusive (7 F. R. 3153, 4798).

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* Amendment 45 applied to molasses "delivered at the mill or at the mill tank".

Prior to the execution of the contract, defendant, through both its attorney and its Acting Manager, made both oral and written inquiry at the Office of the Regional Administrator of the Office of Price Administration in San Juan concerning the ceiling price applicable to the sale (R. 98-9, 73-4, Pltf. Ex. 4-A, R. 24-5) and under date of February 29, 1944, was advised in writing that "the present ceiling price of molasses is the highest price charged during the base period, April 10–May, 1942 to each class of purchaser" (Pltf. Ex. 4-B, R. 26).

The defendant's uniform practice had been to sell to all buyers at the best price obtainable, and to make no classification or distinction among its buyers (R. 88, 90-1). Thus, all sales made by defendant to all classes of buyers during the base period of April 10–May 10, 1942 had been made at a uniform price of 17¢ (Deft. Ex. VII, R. 32).

Accordingly, defendant entered into the contract of March 3, 1944 at a price of 17¢ per gallon, it being specifically provided that such price would "be subject to readjustment if it shall be so determined after this date by * * * the Office of Price Administration" (Ptlf. Ex. A, R. 103).

Defendant knew of the amendment of May 9, 1942, but did not think that it affected the molasses sold under the previously executed contract of March 3, 1944 (R. 71). Plaintiff admittedly made no suggestion or request that the parties readjust the price originally specified in the contract (R. 95). As the District Court said: "No opportunity was offered the defendant to make the adjustment which the contract anticipated" (R. 141). The first knowledge defendant had of the Price Administrator's position was when this suit for treble damages was instituted.

2. On the issue of "delivery", the contract of March 3, 1944 was perhaps not as clearly drawn as it might have been. One clause recited that "Delivery shall be made from June to December 15, 1944." But another clause read "The Buyer shall take the molasses in the tanks of the Seller, at Rufina Central, at Guayanilla, or at Penoncillo, weighed on the scales of the Seller." Any latent ambiguity in the contract is dispelled by a stipulation of fact entered into between the parties (R. 12-14). It was stipulated:

"(a) That due to the fact that the purchaser did not have sufficient storage facilities in which to keep the subject molasses as soon as manufactured by defendant the latter agreed as part of the contract's consideration to grant the purchaser the right to keep at the latter's risk said molasses in a storage tank located at Guayanilla Bay, property of defendant to be used by Destileria Serralles, Inc., provided, however, that removal therefrom should be made by the purchaser before December 15, 1944;

(b) That defendant pursuant to said agreement, placed in a tank owned by it and situated at Penoncillo, Guayanilla Bay, about 2 miles away from the Sugar mill, the following quantities of molasses for the purchaser on the following dates:

472,438	gallons	From March 4 to March 31, 1944.
321,855	"	From April 1 to April 30, 1944.
93,692	"	From May 1 to May 8, 1944.
177,978	"	From May 9 to May 31, 1944.
184,077	"	From June 1 to June 24, 1944.

(c) That said molasses could be removed by the purchaser, pursuant to the terms and conditions of the contract, *at any time, at its own risk and expense and by its own transportation facilities.*" (Italics supplied)

3. A "colono" is one who grows sugar cane and supplies it to the "central" or mill of another for grinding, through which process raw sugar and molasses are obtained. The colonos who had grown and supplied defendant with the sugar cane from which the molasses in question had been produced had a participation in the molasses and a right to a specified percentage of the proceeds of the sale under applicable provisions of law, as plaintiff's counsel conceded at the trial (R. 89). The order establishing "Fair and Reasonable Prices for the 1943-1944 crop of Puerto Rican Sugarcane" issued by the War Food Administration of the Department of Agriculture on March 27, 1944 (9 F. R. 3380) under powers conferred by law, fixed the share of the colonos in the proceeds of the molasses. As summarized in the testimony, the Regulations of the Public Service Commission of Puerto Rico, and those of the Department of Agriculture fix the share as follows (R. 83):

"The share that belongs to the colono is half of the ceiling price [i.e. the lawful contract price] of the molasses after deducting the four cents basic and some expenses that always occur in the manipulation of the molasses."

The Department of Agriculture has authorized defendant, in view of the pendency of this action, to make only a provisional or partial distribution to the colonos "until it is definitely decided at what price shall the molasses corresponding to the 1943-44 crop be finally liquidated" (Deft. Ex. A, R. 127, Deft. Ex. B, R. 127-9).

These colonos will suffer heavily if the Circuit Court's opinion is allowed to stand.

4. The Circuit Court's direction to the District Court to reconsider the question of treble damages is curious, seems clearly erroneous and, unless corrected, may result in a grave inequity. Under Section 205(e) of the Act, Congress conferred upon the District Court unfettered discretion to withhold treble damages, irrespective of proof that an overcharge was neither wilful nor the result of failure to take practical precautions. The District Court, which heard the testimony, expressly found that "Defendant did not purposely or intentionally violate the regulations" (R. 137), and, in the exercise of its discretion, refused to award treble damages (R. 142-3).

Nevertheless, the Circuit Court indicated that the District Court abused its discretion because "it appears to have excluded, as irrelevant, evidence of defendant's direct knowledge of Amendment 32" (R. 166). But the testimony of record already showed conclusively that the defendant did have direct knowledge of Amendment 32 (R. 71), so that any additional evidence bearing on this point would be wholly redundant. The fact that the Circuit Court considered that the District Court had misinterpreted the term "purchaser of the same class", appearing in the General Maximum Price Regulation (R. 167) is wholly beside the point, because the Circuit Court had dismissed the Regulation as having no bearing on the case (R. 165). From the standpoint of good faith, the phrase in the OPA letter of February 29, 1944, "each class of purchaser", added nothing, for, as pointed out above, defendant had purchasers of only one class, namely, the highest bidder for the commodity, and the record conclusively so shows (R. 88, 90-1, Deft's Ex. VII, R. 32).

Nothing in the record, we submit, either requires or justifies a remand of the case for further consideration of the exercise of discretion with respect to an award of penal damages.

Questions Presented

1. Did "delivery" of the molasses occur on deposit in the tank at Penoncillo (located two miles from defendant's mill), as the District Court held, or did it occur only on the buyer's removal of the molasses from the Penoncillo tank, as the Circuit Court ruled?

2. If "delivery" occurred on deposit in the Penoncillo tank, did Amendment 32, fixing a ceiling price of 13.6¢, apply, when the amendment was expressly limited to molasses "delivered at the mill"?

3. If, as the Circuit Court held, "delivery" occurred only when the buyer removed the molasses from the Penoncillo tank, *i.e.*, after August 2, 1944, did Amendment 45 apply, when such amendment was expressly limited to molasses "delivered at the mill or at the mill tank"?

4. Does Section 205(d) of the Emergency Price Control Act protect a seller who, in good faith, completes a contract which, when made, was in accordance with an OPA regulation?

5. Does Section 205(e) of the Emergency Price Control Act, as amended July 25, 1946, require the withdrawal of this action as "the violation arose because the person selling the commodity acted upon and in accordance with the written instructions of the Administrator or any re-

gional administrator or district director of the Office of Price Administration"?

6. Were the colonos, whose interests have been directly and adversely affected by the decisions below, indispensable parties to the action?

7. Where the award of treble damages lies within the unfettered discretion of the District Court, may the Circuit Court order the District Court to reexamine its refusal to award, when all the material evidence bearing upon the exercise of the discretion was before the District Court?

Reasons for Allowing the Writ

1. The holding of the Circuit Court that "delivery" did not take place until the molasses was actually removed from the storage tank by the buyer involves the construction of a federal regulation not previously passed upon by this Court and places upon the Regulation a construction believed to be wholly erroneous.

2. The holding of the District Court that Amendment 32 rendered unlawful the 17¢ charge made in respect of molasses delivered after May 9, 1944, and the holding of the Circuit Court that Amendment 45 rendered unlawful the 17¢ charge in respect of molasses delivered after August 2, 1944, involve the construction of federal regulations not previously passed upon by this Court and place upon such regulations a construction which it is believed is not warranted and indeed is in conflict with the decisions of this Court and the Circuit Courts of other Circuits, holding that Emergency Price Control regulations to which penal sanctions are attached must be strictly construed. *M. Kraus &*

Bros., Inc. v. *United States,* 327 U. S. 614 (1946); *Yakus* v. *United States,* 321 U. S. 414 (1944); *Porter* v. *Federated Meat Corporation,* 157 F. (2d) 276 (C. C. A. 2d, 1946); cf. *Fleming* v. *Ashbough,* 158 F. (2d) 826 (C. C. A. 9th, 1947).

3. The holding of the Courts below that Section 205(d) of the Emergency Price Control Act does not protect a seller who in good faith completes a contract which, when made, was in accordance with an OPA regulation, and the further holding of the Circuit Court of Appeals that the July 25, 1946, amendment of the Emergency Price Control Act does not require the withdrawal of this action, involve important questions of federal law which have not been, but should be, settled by this Court.

4. The holding of the Courts below that the colonos were not indispensable parties is believed to be in conflict with the decisions of this Court holding that persons are indispensable parties who have "an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." *Shields* v. *Barrow,* 58 U. S. 130, 139 (1854); *Barney* v. *Baltimore City,* 73 U. S. 280 (1867); *Commonwealth Trust Co.* v. *Smith,* 266 U. S. 152 (1924); *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371 (1945).

PRAYER

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the First Circuit and that the duly certified copy of the transcript of proceedings below which accompanies the petition herein shall be treated as though filed in response to the aforesaid writ, to the end that this cause may be reviewed and determined by this Court; that the judgment and decision of Circuit Court of Appeals may be reversed; and that your petitioner may be granted such other and further relief as may be proper.

MARIO MERCADO E HIJOS

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New York, October 31, 1947.

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No. ——

CLINTON P. ANDERSON, Secretary of Agriculture, United States Department of Agriculture,

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—against—

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Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the United States District Court for Puerto Rico (R. 137-43) is officially reported *sub nomine Porter, Price Administrator* v. *Mercado* in 67 F. Supp. 107. The opinion of the Circuit Court of Appeals for the First Circuit (R. 159-68) is officially reported in 163 F. (2d) 303.

Jurisdiction of This Court

This is set forth at page 2 in the preceding petition under the heading "Basis of This Court's Jurisdiction".

Statement of the Case

The case is stated in the petition at pages 2-8 under the heading "Statement of Matter Involved".

Statute and Regulations Involved

The statutes and regulations involved are certain sections of the Emergency Price Control Act of 1942 and certain regulations issued thereunder. These are set forth in the Appendix attached hereto.

Specification of Errors To Be Urged

The Circuit Court of Appeals erred

1. In holding that "delivery", within the meaning of Revised Maximum Price Regulation No. 183, did not occur until the molasses was actually removed from the Penoncillo tank by the buyer.

2. In holding that that Amendment 45 (or Amendment 32) was applicable to the type of factual situation here presented.

3. In construing §205(d) of the Emergency Price Control Act of 1942 as not protecting a seller who completes in good faith a contract which, when made, was in accordance with an OPA regulation.

4. In construing the July 25, 1946 Amendment to §205(e) of the Act as not requiring the withdrawal of this action by the Price Administrator.

5. In holding that the colonos, whose interests were directly and adversely affected by the decisions below, were not indispensable parties to the action.

6. In remanding with the direction that the District Court reconsider the exercise of its discretion with respect to the award of treble damages.

POINT I

The "delivery" under the applicable regulation occurred when the molasses was deposited by the seller in the Penoncillo tank and immediately thereafter was subject to removal by the purchaser "at any time, at its own risk and expense and by its own transportation facilities".

Section 17(3) of Revised Maximum Price Regulation No. 183 defines "to deliver" as "to transfer actual possession of the commodity to the purchaser". We are prepared to accept this definition as controlling here. Thus the issue on "delivery" narrows down to the question at what point of time did the defendant here "transfer actual possession of the commodity" to Seralles, Inc. The District Court, who heard the evidence, found that this transfer occurred when the molasses was physically deposited in the Penoncillo tank at the seacoast, some two miles from the sugar mill. The action of the Circuit Court in holding otherwise was, we submit, wholly unwarranted.

The point at which delivery occurred must be determined on the basis of the contract of March 4, 1944, the stipulation between the parties and the testimony in evidence. A reading of the contract in its entirety shows that it was couched in the language of businessmen not versed in the

precise use of legal language. The contract recited that "Delivery shall be made from June to December 15, 1944", and immediately thereafter it is recited that the Buyer binds itself "to take away" the total amount of molasses from the tanks of the Seller before the commencement of the 1944-45 grinding season should the latter commence before December 15th (Pltf. Ex. A, R. 103). Obviously, the word "delivery" was not used in its technical meaning, for, immediately thereafter, we find the phrase "take away", used with identical implication. More important is the later clause in the contract, "The Buyer shall take the molasses in the tanks of the Seller at Rufina Central, at Guayanilla, or at Penoncillo, weighed on the scales of the Seller" (R. 104). When a businessman recites that he will "take" a commodity, the clear implication is that at that point delivery occurs, particularly when title has already passed and he makes payment at the time of the "taking", as occurred here (R. 13).

But whatever may be the ambiguity in the contract as to the point of delivery, any doubt is resolved by the stipulation of the parties for, in view of the stipulation and the evidence of record, it is clear that the delivery occurred on the deposit of the molasses in the Penoncillo tank, not when withdrawn therefrom. As the stipulation of fact recites, "the purchaser did not have sufficient storage facilities in which to keep the subject molasses as soon as manufactured by defendant" (R. 12). Under these circumstances, the defendant agreed "as part of the contract's consideration to grant the purchaser the right to keep at the latter's risk said molasses in a storage tank located at Guayanilla Bay", subject only to the condition that ultimate removal should be made not later than December 15, 1944 (R. 12). Clearly, had the purchaser owned the necessary storage facilities, delivery would have occurred when the molasses

was deposited in such storage facilities. But because the purchaser lacked storage facilities, the seller put at the purchaser's disposal the seller's storage tank at Penoncillo on Guayanilla Bay. This being the case, it is presumptive that delivery occurred on deposit in the storage facilities.

But the stipulation does not stop here. It was expressly stipulated and accordingly admitted that upon the deposit of the molasses in the Penoncillo tank the molasses could be removed by the purchaser, pursuant to the terms and conditions of the contract, "at any time, at its own risk and expense and by its own transportation facilities" (R. 13). Since upon the deposit in the Penoncillo tank the purchaser immediately enjoyed all these rights of full and free dominion and control over the molasses, surely there occurred on deposit in such tank a transfer of "actual possession of the commodity to the purchaser".

The fact that the Penoncillo tank was owned by the seller and not by the purchaser is of no consequence. Indeed, the definition of "to deliver" in Section 17(3) of Revised Maximum Price Regulation No. 183 itself makes this eminently clear. "To deliver", says the Regulation, "means to transfer actual possession of the commodity to the purchaser *or to any carrier including a carrier owned or operated by the seller for shipment to the purchaser*". Thus, where actual possession of a commodity is transferred to a carrier, there is a delivery under the Regulation in spite of the fact that the carrier is "owned or operated by the seller". Thus if the seller here had owned and operated a railway in Puerto Rico and, pursuant to the contract of March 3, 1944, had deposited the molasses in a tank car owned and operated by the seller for shipment to the purchaser, there is no question but that delivery would have occurred on the deposit in such tank car.

The situation here is quite parallel. The purchaser did not own any storage facilities, and accordingly the seller agreed to put at the purchaser's disposal its own tank at Penoncillo on Guayanilla Bay and the molasses was deposited in such tank, subject immediately to the above-recited rights of the purchaser. Had the tank been on wheels, namely, in the form of a tank car owned by the seller, unquestionably delivery would have occurred at that point, within the precise language of the definition of "to deliver" in the Regulation. The fact that the storage tank was not on wheels is immaterial.

In any event, the regulatory definition makes it perfectly clear that the ownership by the seller of the container in which the commodity is stored does not prevent a delivery, when, had the storage facilities been owned by the purchaser, delivery clearly would have occurred.

Thus we find that the Penoncillo tank was used for storage because, and only because, the purchaser did not have its own storage facilities; we find that at the time when the molasses was deposited in such tank title to the molasses already had passed; we find that at that point the purchaser made payment for the molasses as and when deposited in the tank; we find that on such deposit "said molasses could be removed by the purchaser, * * * at any time, at its own risk and expense and by its own transportation facilities"; and finally we find that such molasses, while it remained in the tank, was insured by the purchaser, the premiums were paid by the purchaser and the purchaser was the beneficiary thereof. Under these circumstances, how can it be said that "actual possession" had not been transferred?

"Actual possession" connotes full and complete dominion and control, and, when such full and complete dominion and control is accomplished, delivery has occurred within

the meaning of the Price Regulation. Indeed, in this case the buyer unquestionably considered that he had acquired actual possession, for under date of July 13, 1944, the buyer in a report to the War Production Board stated that the 1,250,000 gallons in the Penoncillo tank was "molasses on hand" (Deft. Ex. V, R. 30).

When the first deposit of the Serralles molasses was made in the Penoncillo tank, there already was in such tank some 10,000 gallons owned by other purchasers. This gallonage, however, was all delivered to such other purchasers by March 31, 1944, well prior to the effective date of Amendment 32 (R. 68, 73, 85, 91). Now molasses is fungible, if any commodity is fungible, and the presence of these 10,000 gallons originally in the tank did not affect the "actual possession" of the Serralles molasses as and when it was deposited in such tank pursuant to the contract. In straining every effort to enlarge the judgment below, the Circuit Court, we submit, over-emphasized this relatively minor factor, and in so doing severely penalized not only the defendant here but the many colonos who will suffer heavily should the Circuit Court's opinion be permitted to stand.

POINT II

Amendment 32 and Amendment 45, prescribing a 13.6¢ ceiling, were inapplicable to the facts here presented.

The District Court, holding that the delivery of the molasses occurred when it was deposited in the Penoncillo tank at Guayanilla Bay, invoked Amendment 32, effective May 9, 1944, and applied the ceiling price to molasses de-

posited after the effective date of the Amendment. The Amendment applied only to molasses "delivered at the mill". A delivery at the Penoncillo tank, some two miles from the mill and involving substantial transportation and handling costs (for it was necessarily done by trucks), certainly was not a delivery "at the mill".

This regulation carried penal sanctions in the form of criminal liability and treble damages and, accordingly, must be strictly construed. *M. Kraus & Bros., Inc.* v. *United States,* 327 U. S. 614 (1946); *Yakus* v. *United States,* 321 U. S. 414 (1944). As Arnold, *J.* expressed it in his bitter dissenting opinion in *Rainbow Dyeing & Cleaning Co.* v. *Bowles,* 150 F. (2d) 273 (C. A. D. C. 1945),

> "Every reason of morals and fair dealing between a government and its citizens favors a strict construction of these unusual regulations imposing liability regardless of actual fault. A contrary rule would turn every ambiguity into a dangerous trap" (276). • • •
>
> "It would seem that good faith and good administrative practice would require the Office of Price Administration to amend its regulation before it demanded treble damages" (278).

As stated by the court in *Porter* v. *Federated Meat Corporation,* 157 (2d) 276, 279 (C. C. A. 2d, 1946):

> "Before a violation can be found, what was done must fall within the language of the regulation sufficiently to give those subject to it notice that their acts are illegal."

In *Bowles* v. *Eastern Sugar Associates,* 64 F. Supp. 509, revd. and remanded on other grounds 159 F. (2d) 299 (C. C. A. 4th, 1947), the Court, rejecting the construction of the regulation urged by the Administrator and dismissing the action, said (p. 513):

"In short, we believe that if the Office of Price Administration, in drafting its regulations, is unable to say what it means in reasonably clear language, the public should not be penalized, but should be given the advantage of the ambiguity."

A similar question was passed upon by the Circuit Court of Appeals for the Ninth Circuit in *Fleming* v. *Ashbaugh*, 158 F. (2d) 826 (C. C. A. 9th, 1947). There the Government sought damages from a buyer for an alleged violation of §1381.1 of Maximum Price Regulation No. 164 which provided:

"§1381.1. Maximum prices for red cedar shingles. On and after June 29, 1942, regardless of any contract, agreement, or other obligation (a) *Where the shipment originates at the mill* rather than at a distribution yard, no person shall sell or deliver red cedar shingles, and no person shall buy or receive red cedar shingles in the course of trade or business, at prices higher than the maximum prices set forth in Appendix A, incorporated herein as §1381.1."

Affirming a judgment for the defendant, the court stated (p. 828):

"It is obvious from the reading of paragraph 1381.1 that the burden of proof upon the Price Administrator is to show that each of the shipments in question 'originates at the mill rather than at a distribution yard.' *This regulation fixes no maximum price when the shipment is not from a mill,* even though not from a distribution yard."

The Circuit Court, by postponing the point of delivery until the molasses was removed from the Penoncillo tank, invoked Amendment 45, effective August 2, 1944. This Amendment was applicable to molasses "delivered at the

mill or at the mill tank". But here again we submit that Amendment 45 fell short of covering the molasses here involved. Indeed, what we have said above regarding the inapplicability of Amendment 32 applies with even greater force. In Amendment 45 the Price Administrator undertook to enlarge Amendment 32. But he stopped short at delivery "at the mill tank". Certainly, such language should not be construed as including a delivery at a tank which clearly is not a "mill tank" in any sense of the word. A tank, to be a mill tank, must, we submit, be sufficiently adjacent to the mill as to involve only the usual handling of the molasses after production and into storage *at the mill*. The Penoncillo tank was two miles distant at Guayanilla Bay, and deposit in such tank required handling and transportation charges far heavier and more costly than storage in a mill tank directly adjacent to the mill.

But if there be any doubt as to the meaning of "at the mill tank" it must be resolved against the Price Administrator on the principle of strict construction of a regulation having penal sanctions. See authorities cited, *supra*, pages 20-21.

The Circuit Court rested heavily on the language in Amendment 45 (which did not appear in Amendment 32) reading, "This is a gross price to which may be added no additional charges for warehousing, handling, transportation from mill to mill tank, or between mills of the same company, or for any other service or incidents of sale * * *". There is, we submit, nothing in this language which extends the application of the Amendment beyond the primary requirement that delivery must occur "at the mill or at the mill tank". The phrase "between mills of the same company" certainly does not apply, since the company had no mill at Guayanilla Bay. The fact that the language prohibits no additional charges above the gross price, namely,

13.6¢, for "any other service or incidents of sale" certainly does not mean that where there occurs "any other service" due to delivery at a distant point, the language "at a mill tank" is broadened to include delivery at such distant point. Here again the interpretation which the Circuit Court puts upon this additional language indicates how much it was compelled to strain in order to bring the transaction here involved within the Price Administrator's Regulations.

POINT III

Since defendant, in contracting for the sale of and in delivering the molasses, acted in good faith and in accordance with the General Maximum Price Regulation in effect when the contract was entered into, it is wholly protected from liability by the provisions of §205(d) of the Act.

Even if it were to be assumed that Amendment 32 or Amendment 45 were applicable, defendant incurred no liability in view of the explicit provisions of §205(d) of the Act. Under these provisions, where a contract of sale is entered into in good faith in reliance upon, and in conformity with, all provisions of an applicable regulation promulgated by the Administrator, Congress intended to protect the seller from all liability and penalties, notwithstanding the fact that the regulation relied upon was thereafter modified by the Administrator prior to the time when deliveries under the contract were fully completed.

In the light of the facts hereinabove set forth (*supra*, p. 4) and the findings of the District Court, it is clear that *in entering into* the contract of March 3, 1944 defendant acted "in good faith" and in reliance upon and "pursuant to" the provisions of General Maximum Price Regula-

tion, in effect at the time, within the meaning of §205(d) of the Act. Indeed, it was expressly advised that this regulation governed the sale (R. 91, Pltf. Ex. 4-B, R. 26). The District Court held that the 17¢ contract price "was not in violation of the General Maximum Price Regulation" (R. 137) and this holding was not reversed by the Circuit Court, the Circuit Court saying that "Since in our view Amendment 45 controls, we do not consider the Administrator's alternate position that the sale and delivery violated the General Maximum Price Regulation" (R. 165).

The uncontradicted testimony is that defendant knew of the May 9, 1944, amendment to Revised Maximum Price Regulation No. 183 but "never thought it affected the contract in question because we had sold this molasses to Serralles under contract effective on March 3rd" (R. 71) and the District Court specifically found that "Defendants did not purposely or intentionally violate the regulations" (R. 137).

In §205(d), Congress expressly provided that a seller should be wholly protected for anything done in good faith pursuant to a regulation of the Administrator or pursuant to an "agreement thereunder", notwithstanding the fact that the regulation under which the agreement had been entered into was thereafter modified. The words "or agreement thereunder" are of crucial importance. They establish the clear intention of Congress to immunize from penal liability a seller who completes performance of an agreement which he had entered into in good faith either with the Administrator or with a third party, pursuant to the then applicable regulations of the Administrator.

That such was the intention of Congress further appears from the language used by Congress in the succeeding paragraph (e). Here, the Court will note, Congress expressly limited the actions authorized to cases where the

violation occurred in the act of *selling* a commodity. Congress did not authorize an action for penal damages to be brought against a seller who had violated a regulation either in selling *or* in delivering. The action was authorized only in the situation where the contract of sale itself was entered into in violation of the applicable regulation. The word "sale", as defined in §302(a) of the Act makes no reference to "delivery". The fact that Congress did not regard a "sale" or "selling" as synonymous with a "delivery" or "delivering" affirmatively appears from §4(a) of the Act (50 U. S. C. App. §904(a)) where Congress made it unlawful "to sell or deliver" a commodity in violation of a regulation. In view of the express reference to both sale and delivery in §4(a), the omission by Congress of any reference to delivery in §205(e), which relates to the much narrower question of actions for statutory damages, cannot be regarded as inadvertent. *Cf. Williams* v. *United States,* 289 U. S. 553 (1933). And this section of the Act, insofar as it authorizes the institution of actions for the recovery of damages which are penal in character, must be strictly construed. See cases cited, *supra* pp. 20-21.

POINT IV

Even if defendant in fact violated the Act, this action is required to be withdrawn by plaintiff pursuant to the mandate of the July 25, 1946 amendment, since any violation arose because defendant acted upon and in accordance with the written advice and instructions of the office of the Regional Administrator of the Office of Price Administration.

Effective July 25, 1946 §205(e) of the Act was amended (60 Stat. 676, 677) to include the following provisions:

> "The Administrator may not institute any action under this subsection on behalf of the United States,

or, if such action has been instituted, the Administrator shall withdraw the same—

(1) if the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration; * * *."

These provisions were added after Congress had had spread before it detailed evidence of the policies and practices followed by the Office of Price Administration in the administration of the Act. See HEARINGS BEFORE THE COMMITTEE ON BANKING AND CURRENCY, HOUSE OF REPRESENTATIVES, 79TH CONGRESS, 2ND SESSION ON H. R. 5270, A BILL TO AMEND THE EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED, AND THE STABILIZATION ACT OF 1942, AS AMENDED, AND FOR OTHER PURPOSES. In the light of the facts therein revealed, the purpose of Congress in adding the provisions above quoted is clear and unequivocal. It was to protect sellers from actions by the Administrator of the type here involved under the circumstances disclosed by the record in this case.

It was enacted at a time when the exigencies of war no longer existed and no considerations of public policy could condone the relentless prosecution of suits by the Government for the recovery of multiple damages, penal in character, from persons who had no intention whatever of violating the Act and no realization that their conduct constituted a violation of some one or more of the never-ending torrent of orders, regulations, and schedules that poured forth during the war period.

By the 1946 amendment Congress swept aside all question of good faith and all question of whether or not a technical violation had occurred. It specifically barred the

Administrator from commencing any action, and required him to withdraw any pending action, where a person, in selling a commodity, had acted upon and in accordance with the written advice and instructions of the very persons charged with the responsibility for administration and enforcement of the Act. Here the undisputed fact is that, before entering into the contract of March 3, 1944, defendant went directly to the office of the Regional Administrator of the Office of Price Administration at San Juan and received both oral and written advice and instructions that in selling its molasses defendant was to be governed by the provisions of General Maximum Price Regulation (R. 73-4, 98-9, Pltf. Exs. 4-A and 4-B, R. 25-6). There is and can be in this case no claim that such advice and instructions were not correct when given or that they were not given with the full authority of the Regional Administrator. No such contention was made by defendant upon the trial, and the letter of February 29, 1944 received by defendant from office of the Regional Administrator of the Office of Price Administration was, in fact, introduced in evidence by plaintiff (Pltf. Ex. 4-B, R. 26), a fact apparently overlooked by the Circuit Court in holding the 1946 amendment inapplicable because the person who actually signed the letter "was not one of the officials specified in that amendment as having power to prejudice the Administrator's right of suit" (R. 168). There can be no question that, in thereafter entering into and carrying out its contract of March 3, 1944, defendant acted upon and in accordance with that written advice and instructions, as well as upon the written advice and instructions of the Administrator himself, as embodied in General Maximum Price Regulation.

POINT V

The colonos who owned a joint interest with defendant in the molasses sold and in the proceeds of the sale, which interest would be directly and adversely affected by any recovery in this action, were indispensable parties. Plaintiff's failure to join them as parties made mandatory the dismissal of the action.

This Court has long held that where an indispensable party is not joined the suit must be dismissed. *Shields* v. *Barrow,* 58 U. S. 130 (1854); *Barney* v. *Baltimore City,* 73 U. S. 280 (1867); *Commonwealth Trust Co.* v. *Smith,* 266 U. S. 152 (1924); *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371 (1945). Rule 19. The fact that the judgment would not be technically binding upon the absent parties is not controlling. *California* v. *Southern Pacific Co.,* 157 U. S. 229 (1895); *Arizona* v. *California,* 298 U. S. 558 (1936); *Vincent Oil Co.* v. *Gulf Refining Co.,* 195 Fed. 434 (C. C. A. 5th, 1912). For an analysis of the rule and collection of authorities see the opinion of Vinson, *J.* (now Chief Justice Vinson) in *Green* v. *Brophy,* 110 F. (2d) 539 (C. A., D. C., 1940); *Keegan* v. *Humble Oil & Refining Co.,* 155 F. (2d) 971 (C. C. A. 5th, 1946); 6 *Cyc. Fed. Proc.* §§2136, 2140 (2d ed. 1943).

The test of an indispensable party was laid down by this Court almost a century ago in *Shields* v. *Barrow,* 58 U. S. 130, 139. In language that has been repeated in case after case over the succeeding decades the court defined indispensable parties as

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that in-

terest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

A judgment against defendant for the amount of the overcharge as determined by the Circuit Court would adversely affect the colonos. The amount of money which they are entitled, by law, to receive for the sugar cane from which the molasses was produced is directly dependent upon the determination of the court in this case.

The colonos had a vital interest in the determination to be made herein and a right to be heard in connection therewith. They were, it is submitted, indispensable parties to the action, and plaintiff's refusal to join them as parties required dismissal of the action.

CONCLUSION

For the reasons stated in the petition and in this brief, a writ of certiorari should be issued, as requested in the foregoing petition.

Respectfully submitted,

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New York, N. Y., October 31, 1947.

APPENDIX

Statute

Section 205(e) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. §901 *et seq.*) provides (50 U. S. C. App. §925(e)):

> "(e) * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. * * *"

Section 205(d) of the Act provides (50 U. S. C. App. §925(d)):

> "(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. * * *"

Section 205(e) of the Act was amended, effective July 25, 1946 (after entry of judgment in the District Court), to include the following provision (60 Stat. 676, 677):

> "The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same—
>
> (1) if the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration; * * * ."

A "sale" is defined as follows in §302(a) of the Act (50 U. S. C. App. §942(a)):

> "The term 'sale' includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly."

Regulations

Section 17(3) of Revised Maximum Price Regulation No. 183 provided (8 F. R. 9534):

> " 'To deliver' means to transfer actual possession of the commodity to the purchaser or to any carrier including a carrier owned or operated by the seller for shipment to the purchaser."

Amendment 32 to Revised Maximum Price Regulation No. 183, effective May 9, 1944 (9 F. R. 4820), added a new Section 65 to the Regulation and provided:

> "Maximum price for cane blackstrap molasses sold or delivered in the Territory of Puerto Rico • • • (b) On and after May 9, 1944, the maximum price for molasses shall be 13.6¢ per gallon delivered at the mill."

Amendment 45 to the Regulation, effective August 2, 1944 (9 F. R. 9248) amended the above quoted clause (b) to read as follows:

> "(b) The maximum price for cane blackstrap molasses shall be 13.6¢ per gallon delivered at the mill or at the mill tank. This is a gross price to which may be added no additional charges for warehousing, handling, transportation from mill to mill tank, or between mills of the same company, or for any other service or incidents of sale except that a purchaser from a mill may on resale add the actual transportation charges incurred by him in transporting the molasses from the mill or mill tank to the point at which the buyer receives delivery."